EXHIBIT D

EXCERPT FROM TRANSCRIPT OF PROCEEDINGS JUNE 15, 2022 HEARING

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-99000-cgm

- x

In the Matter of:

BERNARD L. MADOFF,

Debtor.

- x

Adv. Case No. 08-01789-cgm

- x

SECURITIES INVESTOR PROTECTION CORPORATION,

Plaintiff,

v.

BERNARD L. MADOFF INVESTMENT SECURITIES LLC,

Defendants.

- x

Adv. Case No. 11-02569-cgm

- x

IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

v.

BARCLAYS BANK (SUISSE) S.A. ET AL.,

Defendants.

- x

Adv. Case No. 12-01693-cgm

- x

IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

v.

BANQUE LOMBARD ODIER & CIE SA,

Defendants.

- x

Adv. Case No. 12-01695-cgm

- x

IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

v.

BORDIER & CIE,

Defendants.

- x

Adv. Case No. 11-02570-cgm

- x

IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

v.

BANCA CARIGE S.P.A.,

Defendants.

- x

Adv. Case No. 12-01207-cgm

- x

IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

v.

LLOYDS TSB BANK PLC,

Defendants.

- x

Adv. Case No. 10-05355-cgm

- x

IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

v.

ABN AMRO Retained Custodial Services (Ireland) Lim,

Defendants.

- x

Adv. Case No. 10-04492-cgm

- x

IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

v.

STUART LEVENTHAL 2001 IRREVOCABLE TRUST ET AL,

Defendants.

- x

Adv. Case No. 10-05312-cgm

- x

IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

v.

DORON TAVLIN TRUST U/A 2/4/91 ET AL,

Defendants.

- x

Adv. Case No. 10-05421-cgm

- x

IRVING H. PICARD, Trustee for the Liquidation

of Bernard L. Madoff Investment Securities LLC,

Plaintiff,

v.

FRANK J. AVELLINO, individually, and as Trustee,

Defendants.

- x

United States Bankruptcy Court

355 Main Street

Poughkeepsie, NY 12601

June 15, 2022

10:00 A.M.

B E F O R E :

HON CECELIA G. MORRIS

U.S. BANKRUPTCY JUDGE

ECRO: UNKNOWN

MS. GRIFFIN: Thank you, Your Honor.

THE COURT: Thank you. Thank you.

Mr. Woodfield, I'm sorry I didn't get to see your face.

MR. WOODFIELD: Next time I'll -- we're social distancing down here still, Your Honor.

THE COURT: Well, we had to experiment with it too, so understand. You were -- just so you know, you were absolutely clear on the record and your voice was clear. So just --

MR. WOODFIELD: Thank you, Your Honor.

THE COURT: -- be comforted with that. Thank you.

MR. WOODFIELD: Thank you for hearing us.

MS. GRIFFIN: Thank you.

THE COURT: Very good. 1102569, Picard as SIPA Trustee versus Barclays Bank (Suisse) S.A.

MR. GOTTRIDGE: Good morning, Your Honor. Marc Gottridge from Herbert Smith Freehills New York LLP on behalf of the defendants in this adversary proceeding, who we've been calling the Barclays defendants.

THE COURT: Thank you.

MS. LONGO: Good morning, Your Honor. Kim Longo of Windels Marx, special counsel to the trustee appearing in connection with the Barclays matter.

THE COURT: Ms. Longo, it's your motion.

MS. LONGO: Actually, it's Mr. Gottridge's motion.

THE COURT: Oh, I'm sorry. I'm sorry. I apologize. I'm on the summary judgment motions. This is a motion to dismiss. So Mr. Gottridge, I apologize.

MR. GOTTRIDGE: No, not at all, Your Honor. It's all fine. Thank you.

Your Honor, the Barclays defendants, as the Court knows, have moved to dismiss on several grounds. I will be addressing today, you know, in the interest of time, only one of our arguments, namely that the Section 546(e) Safe Harbor requires dismissal of the complaint as against the Barclays defendants to the extent it alleges six-year claims.

As for the other grounds in the motion to dismiss, we will be happy to rely on our briefing, unless the Court has any questions, which I'll be happy to answer.

I also would like to adopt by reference in advance any arguments that Counsel for other defendants in these Fairfield subsequent transferee cases that are on the calendar a bit later will present to the extent that they also relate to the Barclays defendant's situation.

THE COURT: Well, I just would like for you to highlight which ones you might be depending on because I want to be clear.

MR. GOTTRIDGE: Yeah.

THE COURT: Because each one of these is a different set of facts.

MR. GOTTRIDGE: No. Understood, Your Honor. And I just want to say in advance that the counsel for the defendants that will be arguing today all conferred among themselves in an effort to streamline the presentation so that we're not repeating one another's arguments and not taking up more of the Court's time than we need to. But the --

THE COURT: Trust me. I brought enough snacks and enough food to stay the day because I wanted to fit your set of facts.

MR. GOTTRIDGE: I appreciate that, Your Honor.

I think in terms of the other arguments, the customer property argument which I believe Mr. Zulack will be raising, we will adopt certainly his arguments. And to the extent that any of the other defendants raise the issues --

THE COURT: I can't use another person's argument for your case.

MR. GOTTRIDGE: Okay.

THE COURT: I cannot do that.

MR. GOTTRIDGE: Well, we'll --

THE COURT: I mean, I understand you're trying to streamline, but this your case, your set of facts. I need

your arguments.

MR. GOTTRIDGE: And Your Honor, I'm fine with relying on our papers then on the customer property.

THE COURT: Okay.

MR. GOTTRIDGE: I think Your Honor has that all --

THE COURT: If you rely on your papers, that's different.

MR. GOTTRIDGE: That's fine, Your Honor.

So to turn to the 546(e) issue, then, Your Honor, we're obviously well aware of the decisions that the Court issued in the last couple of days, and we certainly are aware that the Court will treat them as law of the case applicable to this motion, so what I'd like to do is to focus really on aspects of that motion -- of that motion that the Barclays defendants made that we believe were not specifically addressed in the multi-strategy and Banque Syz decisions that came out earlier this week.

And the first of those issues will be really under the Cohmad decision. We're calling it Cohmad. It's the April 15th, 2013 decision of Judge Rakoff. Our position that under the Cohmad decision, an innocent subsequent transferee defendant does not lose its 546(e) defense to a recovery action by the trustee merely because of actual knowledge on the part of the initial transferee. That's one issue I'd like to address.

And the second issue I'll address later is that the actual knowledge of Fairfield Sentry in particular is especially irrelevant to the 546(e) issue as to the Barclays defendants to the extent that they are relying on securities contracts other than the BLMIS Fairfield Sentry customer agreements. So those are the two points I'd like to hit.

To start with, Your Honor, I think the Court's decisions earlier this week are very helpful in a couple of regards, and I just want to point out that this Court has now -- in both of those decisions -- reiterated something the Second Circuit has said before and judges of the district court have said before, that the Section 548 Safe Harbor is intended in substantial part to promote the reasonable expectations of legitimate securities investors. And as I'll come to, the Barclays defendants were legitimate investors in real, actual securities.

Secondly, the Court also picked up on what Judge Rakoff wrote in Cohmad and stated that where an initial transferee does not raise the 546(e) defense, which is the case here, the subsequent transferee is entitled to raise a 546(e) defense against recovery of those funds. That's at page 16 of multi-strategy, and I think those are useful starting points.

I think it's also helpful to note some things that the trustee has not disputed, which are critical to the

motion. First of all, the Barclays defendants are not alleged to have had actual knowledge of the underlying Madoff fraud. They are classic innocent subsequent transferee defendants. They were legitimate investors in securities of the Fairfield funds without knowledge that Madoff was engaging in a Ponzi scheme.

Secondly, the Barclays defendants dealt with the Fairfield funds only at arm's length, and the trustee has never alleged otherwise. The trustee has never alleged any basis on which Fairfield Sentry's actual knowledge, if it had actual knowledge, can be imputed to the Barclays defendants.

And I would distinguish this situation, Your Honor, from the Court's decision in the Fairfield investment fund case where the Court was dealing with insiders. We're dealing with people that were affiliated with and indeed arguably were running Fairfield Sentry. The Barclays defendants only dealt with Fairfield Sentry as a complete arm's length third party.

In addition, and this is really kind of getting to the nub of it, the Barclays defendants on this motion show -- and I would refer back to pages 16 to 24 of our initial memorandum of law -- that the statutory requirements for the application of the 546(e) Safe Harbor have all been satisfied, and the trustee did not respond to that point.

They'd rather say it's irrelevant, but they don't actually say that the transactions are not qualifying transactions, that the entities involved are not qualifying or covered entities.

And under the (indiscernible) case which we cited at page 2 of our reply memorandum, and the other cases that the district court cited there, if a defendant makes a motion to dismiss and lays out the circumstances that support that, and the plaintiff in opposition fails to address that, the point is conceded. And that's where we are.

So where we are is that the trustee has conceded on this motion, that Section 546(e) would apply to the initial transfers and that the Barclays defendants have that defense, which means that unless the actual knowledge rule comes in to play and compels a different result, the trustee's recovery claims for the six-year claims would have to be dismissed.

So this comes to the question then of -- that I'd like to raise first, which is under Judge Rakoff's analysis in Cohmad, does an innocent subsequent transferee lose the 546(e) defense? Is it barred from raising the 546(e) just because the initial transferee higher up the chain is alleged to have had actual knowledge?

Our point here, again, is supported by the fact

that as this Court recognized earlier this week and as Judge Rakoff stated in Cohmad at page 7 at the Westlaw pagination that in a situation like this where the trustee has settled with the initial transferee and not raised the 546(e) defense itself, a subsequent transferee is "entitled to raise a Section 546(e) defense against recovery."

Now, of course, Judge Rakoff in Cohmad created an exception to this rule, but it is a limited exception. The only thing it does is it bars those transferee defendants that had actual knowledge -- whether they're initial transferees or subsequent transferees -- from raising the 546(e) defense.

I would point in particular to the final section, the concluding section on page 10 in the Westlaw pagination of Cohmad where Judge Rakoff concluded by making this point. "While Section 546(e) generally applies to the adversary proceedings brought by the trustee, those defendants who claim the protection of Section 546(e) through a Madoff Securities account agreement but who actually know that Madoff Securities was a Ponzi scheme are not entitled to the protection of Section 546(e) Safe Harbor, and their motions to dismiss the trustee's claims on that ground -- on this ground must be denied."

So what Cohmad does is it sets up a general rule, which is the general rule that 546(e) is available in

general, and it sets up an exception. So under the -- if you fall under the general rule, the defendant can invoke 546(e) and prevail on a motion to dismiss, but if you fall under the exception, you cannot.

And our position is simple, that given what we've said, that there's no dispute here, there's no allegation to the contrary, that the Barclays defendants did not have that actual knowledge, they fall within the general rule. They don't fall within the exception.

And I think it's important to point out that Cohmad is different than a voidability. Cohmad is a special rule that was created by the Court. It doesn't focus the way a voidability does on the transfer itself. The attributes of the transfer are not its concern. The concern of the Cohmad actual knowledge rule is on the defendant, the particular defendant being sued in a particular adversary proceeding. And even more narrowly, it's on a particular aspect of that defendant, which is did it or did it not have actual knowledge of the underlying fraud?

And I think Judge Rakoff made it very clear in a paragraph that specifically addressed subsequent transferees on page 7 of Cohmad where he wrote "in sum, if the trustee sufficiently alleges that the transferee from whom he seeks to recover a fraudulent transfer, in this case the Barclays defendants, knew of Madoff Securities fraud, that a

transferee cannot claim the protection of 546(e) Safe Harbor."

So in this adversary proceeding, the Barclays defendants, not Fairfield Sentry, are the parties from whom the trustee seeks to recover the fraudulent transfer or the proceeds thereof. So we fall within the rule -- again, the general rule, not this Cohmad actual knowledge exception.

And I think it's significant that not once in Cohmad did Judge Rakoff state that an innocent transferee defendant that lacks actual knowledge forfeits the 546(e) defense because it happens to be the case that the initial transferee had such knowledge. In fact, not once in Cohmad did Judge Rakoff say that an innocent transferee defendant lacking actual knowable forfeits, or loses, or is stripped of its 546(e) defense at all. He doesn't address it at all.

And if you look at the rationale that Judge Rakoff laid out in Cohmad, which is consistent again with what Your Honor picked up on earlier this week, the idea is that the statute is intended to promote the reasonable expectations of those who invested without actual knowledge of the underlying fraud while at the same time preventing a windfall from being reaped by those defendants who did know of the actual fraud and therefore knew they were not trading -- investing in real securities.

So if you look at the -- page 19 of Your Honor's

multi-strategy decision, the Court quoted from the Second Circuit's decision in Fishman which involved initial transferees.

And I would submit that as initial -- as innocent subsequent transferees, the Barclays defendants have at least as strong a reasonable expectation that their real actual securities transactions were final and would not be unwound, at least as strong as that of the initial transferees who dealt directly with BLMIS in the Fishman case. Those defendants mistakenly but honestly believed they were trading actual securities. The Barclays defendants correctly and honestly traded actual securities.

And one other point about Judge Rakoff's Cohmad decision. It is significant, we believe, that Judge Rakoff after issuing the Cohmad decision issued another decision in which he clearly expressed his expectation as to how this issue would play out.

The case I'm referring to, it's cited to in our reply brief. It's Picard versus ABN AMRO 505 B.R. 135. And at page 142 after citing the Cohmad decision, Judge Rakoff stated, "Thus the Court has found that in the majority of cases, Section 546(e) requires the dismissal of the trustee's avoidance claims, except those brought under Section 548(a)(1)(a), and related recovery claims under Section 550(a)."

So the clear expectation that the district court had, the same judge who issued Cohmad was that as this issue pled out, the subsequent transferees in most cases, meaning the ones who were innocent and didn't have actual knowledge of the underlying fraud would have a valid 546(e) argument and could press that successfully on a motion to dismiss.

Only in a minority of cases where there was actual knowledge on the part of the subsequent transferee. In those cases, the subsequent transferee would lose. But if you turn that on its head as the trustee would do, if every single subsequent transferee defendant, even the innocent ones like the Barclays defendants that dealt with Fairfield Sentry is now to be deprived of the protections of the safe harbor just because Fairfield Sentry, a third party, had knowledge, the Safe Harbor will not do what Judge Rakoff anticipated. It will not protect against recovery in a majority of these cases. In fact, it would protect against the recovery claims in none of these closes, which I submit is exactly backwards.

It would also create another anomaly, which is that if you imagine two subsequent transferees -- we'll call them A and B -- A got its subsequent transfer from an initial transferee that did not have actual knowledge, an innocent initial transferee. And let's assume A and B are both innocent subsequent transferees. And then let's say B,

as in the Barclays defendants, dealt with a transferee -- an initial transferee that had actual knowledge. If the trustee's view of these cases is right, A will be able to assert 546(e), and B, the Barclays defendants, will not, all because of the happenstance that a third party either did or did not have actual knowledge. That is -- there's really no justification for that under applying a statue where the purpose of it is to protect the legitimate interests and the legitimate expectations of securities investors.

I'd just like to go to the second point I wanted to make which concerns the additional holding of Judge Rakoff and the Cohmad opinion which deals with financial institution defendants, specifically including the Barclays defendants, that also claim the Safe Harbor protection, not only because Fairfield Sentry and BLMIS had a customer agreement but separately, because there was a separate securities contract, in this case the securities contract between Fairfield Sentry and the Barclays defendants governing the shareholdings of the Barclays defendants in Fairfield Sentry.

Judge Rakoff addressed this and said it was a different sort of alternative pathway, as we would call it, to the Safe Harbor protection, and he discussed this extensively at pages 8 through 10, Cohmad. And we would submit that, you know, we've discussed this in the

memorandum of law and a reply -- and I won't go over all of that -- but we'd submit that the facts of this case fit that like a glove.

The key thing to remember though, I think, is that the fundamental concern that motivated Cohmad, and it's a legitimate concern, that if in the initial securities contracts between BLMIS and Fairfield Sentry, if those were illusory contracts, they were not real securities contracts, and if Fairfield Sentry knew they were illusory, you could understand that's a serious concern, but that concern has no part to play in this alternative analysis, and the reasons are two.

First of all, the securities contract between Fairfield Sentry and the Barclays defendants, which is the contract that we're relying on here for this branch of the analysis as the actual securities contract, was a real contract. The Barclays defendants' purchases of Fairfield Sentry shares were real. The Barclays defendants' redemptions and sales of those shares was real. So the concern really melts away.

The second thing, as Judge Rakoff held in Cohmad, in these circumstances, the initial transfers which the trustee alleged were intended to fund the defendants' redemptions from Fairfield Sentry were made "in a connection with" those real transactions for purposes of 546(e), and

that's the statutory language.

So for those reasons, this separate pathway applies and is a separate way that 546(e) applies, and it would be particularly odd and unjustified to say that, well, because Fairfield Sentry, the initial transferee, knew that its contract with the Madoff Securities was illusory, that that should bar this separate avenue to 546(e), which does not in any way rely on that contract but rather relies on real securities contracts pursuant to which the Barclays defendants traded real securities.

So in conclusion, Your Honor, we think that applying Judge Rakoff's reasoning to the case of the Barclays defendants requires dismissal of the trustee's six-year claims based on 546(e), and we believe there's nothing about the Court's decisions earlier this week that would change that.

Happy to answer any questions Your Honor has.

THE COURT: Ms. Longo?

MS. LONGO: Thank you, Your Honor.

I too was under the understanding, just to start, that we would essentially be arguing 546(e) in this case, and more or less it's opting or incorporating the arguments from our other colleagues, but I'm also happy to rest on my papers on those other matters.

Just as to customer property, I would just say as

we've made clear in our papers and as Your Honor has as well, any fact-based arguments which defendants make, which there are -- a lot of them are just inappropriate on a motion to dismiss with respect to that matter.

But speaking as to Section 546(e) specifically, I don't believe anything said by Defense counsel here today is cause to change the trustee's analysis or for this Court to veer from its decisions this week in the multi-strategy fund in Banques cases where Your Honor rejected defendants' 546(e) arguments in full.

In light of those decisions, I just want to really hit certain highlights here briefly to respond to arguments that Defendants have made today.

So you know, to start, Your Honor, I want to just spend a minute on the framework that Judge Rakoff set up. As detailed by Trustee's counsel in the hearing last May, in Cohmad, the district court set forth two scenarios in which the actual knowledge exception makes Section 546(e) inapplicable.

Scenario 1 is where the initial transferee itself has actual knowledge of the fraud, and Scenario 2 is where the initial transferee does not have actual knowledge but the subsequent transferee does. And as Your Honor's multi-strategy in Banques decisions acknowledged, our cases here fit squarely within Scenario 1.

This Court's already determined in its Fairfield investment fund decision that the trustee has adequately alleged Sentry's actual knowledge and that the initial transfers to Sentry outside the two-year period are avoidable.

As we see today, Defendants still don't accept what is really the straightforward application of the actual knowledge holding, and they want the Court to find that even if the initial transferee had actual knowledge, it's the defendant's actual knowledge that dictates where or not the Safe Harbor applies, calling it happenstance of being a third party.

They argue there's two ways this could be accomplished, but neither fits nor is appropriate. In their first argument, they say really -- and this is their biggest argument -- in all recovery actions, the subsequent transferee's knowledge should govern, and that really covers the first 10 pages of their reply as they've, you know, argued here today.

They point to Cohmad's Scenario 2 to support this, saying because the subsequent transferee with actual knowledge cannot invoke the protections of 546(e), that therefore the converse has to be true, and so any other subsequent transferee can assert 546(e) without restriction.

But one doesn't naturally follow from the other,

Your Honor. And as the multi-strategy and Syz decisions explained this week, subsequent transferees do have a right to assert a 546 Safe Harbor, but that's an indirect right, and it allows them to step into the shoes of the initial transferee and assert a Safe Harbor defense solely to the extent the initial transferee could itself do so.

That's all the many cases the defendants cite in their reply or that they bring up here in argument really stand for. Sentry's actual knowledge here, their actual knowledge of the fraud precludes both the Sentry and the defendants from asserting Section 546(e).

The district court also made clear in Cohmad in that Scenario 2 where the initial transferee does not have actual knowledge, which again is the opposite of what we have here, is the only time that a subsequent transferee's actual knowledge is relevant. That is page 7.

This one caveat, as the district court called it, is intended to prevent a subsequent transferee with actual knowledge from being able to step into the shoes of an innocent initial transferee.

Now, Defendants have cited to language in their reply from Cohmad, and they've cited again here today. Namely, it's that if a transferee has actual knowledge, then 546(e) cannot apply. But this is just a statement related to that District Court's one caveat. It doesn't mean that

the converse is true and that 546(e) should become automatically available to any other subsequent transferee. Subsequent transferees are still limited by the fact that the safe harbor is intended to protect initial transfers in the first instance.

For Defendants' secondary argument, which they have called an alternative path, and they quote that here, they say a subsequent transferee's actual knowledge should dictate avoidability any time it's a feeder fund subsequent transfer in particular. And this is where they point to Cohmad's hypothetical, where the court considered whether a feeder fund's articles of association could qualify as a securities contract in lieu of the BLMIS agreements. And this is, you know, their argument they brought up here as well.

But in that section of the decision, the District Court doesn't even mention actual knowledge. And to the contrary, as Your Honor pointed out in both Multi-Strategy and SYZ, the District Court directed that such analysis still has to be consistent with the decision in the first instance, meaning that the application of 546(e) is still dictated by the actual knowledge of the initial transferees here. And, if Your Honor is inclined, it's at Pages 18 and 19 of the Multi-Strategy decision, for example.

Defendants' argument also makes no sense because

they're essentially hinging the avoidability of the initial transfer on the characteristics of the various subsequent transferees. And that would leave parties and the Court with no certainty or finality, Your Honor.

At its heart, Defendants' argument really is that 546(e) should separately apply to Section 550 recovery actions, and Defendants call this a red herring in their reply. But their reply very importantly also makes clear in a number of places that this is exactly what they're asking the Court to do. And I'll just name two of those examples, just to put them on the record, Your Honor.

On Page 5, Footnote 3 the reply states that, "Cohmad thus refutes the Trustee's argument that Judge Rakoff specifically limited the safe harbor to avoidance claims." Well, Your Honor, the safe harbor by its terms is limited to avoidance claims.

And on Page 3 of that reply, they say that the Trustee is trying to "deprive an innocent subsequent transferee defendant of its statutory protections based on an unrelated initial transferee's alleged knowledge." And that's similar to the argument they're making here. They're detached from the initial transferee. It's pure happenstance. But again, these are statutory protections provided to initial transferees in the first instance.

And to the extent the subsequent transferee claims

it's innocent, as the Defendant does here, that Defendant does get to make that argument. It's just part of its 550 affirmative good faith defense, Your Honor. It just can't use that same rationale here to take advantage of a safe harbor that's intended for avoidance as opposed to recovery.

Your Honor, very briefly I want to touch on the ABN AMRO case that Mr. Gottridge brought up. He brought it up for the first time in the reply and he brought it up here, so, you know, to the extent he's making any new arguments with that case, I'd like to address whether that's isappropriate to do on reply.

But in any event, substantively, I don't need to spend a lot of time on it. It's a very different safe harbor that speaks to the 546(g) safe harbor with respect to swaps. And it's a very different decision.

That case involved a complex swap transaction with additional parties, additional agreements, and Judge Rakoff clearly even viewed the safe harbors differently. He actually states in there that -- he adds the words in the footnote that Defendants speak to -- he says, "Unlike Section 546(e)", and that's in the beginning of that quote. So that decision has no application here, Your Honor.

Finally, just as a point, because Defendants brought this up, and for the record, the Trustee does not concede that any of the elements of 546(e) are met by virtue

of the initial and subsequent transferees' relationships. You know, more importantly, we just don't think it matters. We do, of course, appreciate that Section 546(e), as relates to the initial transfer from BLMIS to the feeder funds, is a finally determined initial transfer subject to 546(e), as has been held by the Second Circuit.

I believe that is all I have, Your Honor, unless you have any questions.

THE COURT: I do not. Mr. Gottridge? Rebuttal?

MR. GOTTRIDGE: Yes, Your Honor. Just a few points. First of all, on ABN AMRO, we were not introducing anything new on reply. We were just actually responding to arguments that were being made by the Trustee as to what they saw as the limited scope of 546(e).

But the point about that case, I think, is not well taken, that Ms. Long was making. Because in the paragraph that we quoted, as opposed to whatever other paragraph she's relying on, Judge Rakoff says, "Section 546(g) as a safe harbor is closely related to the safe harbor for securities transactions set forth in Section 546(e)."

And then Judge Rakoff goes on to talk about his own prior decisions in that area, specifically relating to Cohmad. And then it was specifically in relation to Cohmad that he said, "Thus the court has found in the majority of

the cases, Section 546(e)" -- not (g), (e) -- requires the dismissal of the trustee's avoidance claims, et cetera, including the 550(a) related recovery claims.

So, clearly, I think Judge Rakoff was talking about 546(e) in that part of the decision, even though the case was decided under the parallel swaps 546(g) safe harbor.

I think also on that point, a related point that Ms. Long made, was, well, the safe harbor is a statutory defense, but only to the avoidance of an initial transfer. Well, that's true as far as it goes, but it's not the whole story. And in the context of a recovery action, I think it's a really materially incomplete statement.

Cohmad itself makes clear more than once that the safe harbor defense is not only a defense to an avoidance claim, but is also available, unless the defendant had actual knowledge, to any transferee defendant "from whom he -- the trustee, that is -- from whom he seeks to recover." That's at Page 7. So the focus is then on -- I mean, the trustee does not bring these avoidance actions just for the point of -- the purpose of getting avoidance. The goal -- even though recovery is a separate step, the goal is to be able to recover.

And to say that a defendant sued in a recovery action cannot assert the 546(e) defense is simply wrong,

because it's just inconsistent with what Judge Rakoff say, not only at Page 7 but at Page 10. He's talking about it as a "defense against recovery of those funds." In fact, it would make no sense, because we agree with Ms. Longo, that the 546(e) defense does not apply to subsequent transfers. We've never said it does.

But that's precisely why when the judge -- when Judge Rakoff or other judges talk about a defense against recovery of those funds and talk about subsequent transferees being able to assert 546(e), which Cohmad clearly establishes some subsequent transferees can do that.

When it talks about that, it must mean that it's a defense that can be raised as to the initial transfers by a subsequent transferee. And the general rule that Cohmad sets out is it can be raised. The exception is whether that defendant has actual knowledge. That defendant, not the initial transferee, but the subsequent transferee in a case of a subsequent transferee that's being sued in a recovery action.

And I think Ms. Longo was unable to cite there was a particular point, a part of the decision by Judge Rakoff in Cohmad, because I don't think it exists, where Judge Rakoff says you only look at the initial transferee's knowledge. That's not what he does. He actually refers to both initial and subsequent transferees there.

I would also add that there are numerous other cases, including this Court's decision in Fairfield Investment Fund, where the Court cited Cohmad and wrote that a subsequent transferee is "entitled to raise a Section 546(e) defense against recovery." That's at Page 3 of that decision.

That was also repeated in Multi-Strategy and in SYZ earlier this week at Page 16 of each decision. And there were numerous other cases. In Footnote 3 of our reply, we cite cases like AP Services, decided by Judge Kaplan in the District Court, Boston Generating, decided by Bankruptcy Judge Grossman; which stand for the proposition that 546(e) does furnish a defense to a recovery action as well as to an avoidance action.

The last point I just wanted to make had to do with the one caveat phrase that the Trustee has cited. I think before you can say what the caveat is, you need to look at the previous sentence to see what rule is this a caveat to. And the rule is, if you look back at the previous sentence of Cohmad, the previous paragraph, is that where 546(e) applies, the Trustee can only pursue claims against a subsequent transferee to the extent that the initial transfer is subject to 548(a)(1)(A), no others. That's the only exception.

And what Judge Rakoff was saying here with this

caveat is, okay, in the situation where the initial transfer is protected by 546(e) because the initial transferee, you know, doesn't have knowledge, but the subsequent transferee has knowledge, that would be inappropriate to allow that subsequent transferee to invoke 546(e). We don't have a problem with that because our situation is the polar opposite.

The problem here is that just by luck or happenstance or fortuity, or whatever you want to call it, the Barclays Defendants happen to have taken their subsequent transfers from an initial transferee that had knowledge, but they themselves do not have actual knowledge. They have never been alleged to have actual knowledge. And it's inconsistent with Cohmad and inconsistent with Section 546(e)'s purpose to deny them the defense.

Thank you.

THE COURT: Thank you. Court will take a 10-minute recess.

(Recess)

THE COURT: 12-01693, Picard as SIPA Trustee v. Banque Lombard Odier and Cie SA. State your name and affiliation.

MR. HANCHET: Good morning, Your Honor. This is Mark Hanchet, of Mayer Brown, on behalf of Lombard Odier. With me is Jack Zulack, of Allegaert Berger & Vogel. I'll